Let's Pretend Discrimination Is a Tort

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I. INTRODUCTION

In the past decade, the Supreme Court has repeatedly invoked tort common law to interpret federal discrimination statutes.[1] During this same time period, the Supreme Court increasingly invoked textualism as the appropriate methodology for interpreting these statutes.[2] One immediate effect of these two trends—tortification and textualism—is to restrict discrimination law by tightening causal standards.[3]

This Article explores how interpreting discrimination statutes through the lenses of tort law and textualism can expand, rather than restrict, discrimination law. It assumes that courts will continue to characterize discrimination statutes as torts and as deriving from the common law, despite strong arguments to the contrary.[4] It then shows how using tort law and textualism should clarify the roles of intent and causation in discrimination analysis, alter the way courts conceive intent, lower the harm threshold for some cases, and alter current conceptions of textualism.

While these changes would radically change current discrimination law, they do not require the courts to engage in radical statutory interpretation. They only require the courts to take the combined influences of textualism and tortification seriously. This Article shows how each of these changes can occur if courts simply continue with the interpretive framework set forth in recent Supreme Court cases. This framework assumes that when Congress used a word in the discrimination statutes, it intended those words to have a common

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[1] *See infra* Part II.

[2] *See infra* Part II.

[3] *See infra* Part II.

[4] I explore why the discrimination statutes are unlike tort law in other works. Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014) [hereinafter Sperino, *Tort Label*]; Sandra F. Sperino, *Discrimination Statutes, the Common Law and Proximate Cause*, 2013 U. ILL. L. REV. 1, 2.

law tort meaning, unless otherwise indicated.[5] Thus, a court need only look at words in the discrimination statutes and then look to common law meanings to define those words. Likewise, the absence of tort words would mean that Congress did not intend to invoke a particular tort concept.

Applying this interpretive frame results in several important doctrinal shifts in discrimination law. If tort law is the baseline for understanding discrimination law, then discrimination statutes are not intentional torts. None of the major federal discrimination statutes use the word "intent" or "intend" in its primary operative language. And, recent Supreme Court cases have confirmed that the "because of" language in the discrimination statutes refers to causation.[6] Causation is a different concept than intent. While scholars have long argued that plaintiffs should not be required to prove intent to establish disparate treatment claims, the interpretive frame of tortification plus textualism lends further support for this argument.

The move to tort law also helps plaintiffs who want to proceed under a more traditional, intent-based framework. Although the primary provisions of the discrimination statutes do not use intent language, courts often use an intent-based analysis in individual disparate treatment cases. If the courts interpret the discrimination statutes to contain an implied intent standard, they should look to the common law to define intent. If they do, the discrimination intent standard should be a much less onerous standard than the one courts currently use in the discrimination context. Further, using common law ideas of intent opens the possibility that plaintiffs could use the doctrine of transferred intent to establish liability.

If discrimination is a tort, then substantive harassment law is miscalibrated in the context of physical contact or threatened physical contact. Under current doctrine, a supervisor can touch or threaten to touch a worker in inappropriate ways and the worker may lose her harassment case because the conduct was not severe or pervasive enough to constitute harassment.[7] Using tort law, the plaintiff should be able to recover once she has established that she was subjected to unwelcome touching or imminent, threatened touching because of her protected trait. This move would align discrimination law with tort law, which recognizes one inappropriate touching or threatened touching is enough to result in liability.[8] Importantly, tortification and textualism should lead courts to recalibrate and lower the harm threshold in discrimination cases.

Tortification also poses a threat to modern statutory interpretation. When the Supreme Court declares discrimination to be a tort that derives from the common law, the Court is also undermining the idea that the meaning of statutory words is fixed at the time of a statute's enactment. The common law

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[5] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011).

[6] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525–26 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

[7] Sandoval v. Am. Bldg. Maint. Indus., Inc., 578 F.3d 787, 801 (8th Cir. 2009) (discussing the severe and pervasive standard).

[8] RESTATEMENT (SECOND) OF TORTS §§ 18, 21 (1965).

of torts is both a set of substantive choices and a methodology. This methodology allows tort law to change both subtly and dramatically over time, and is a key feature of what it means for something to be a tort and to derive from the common law. Tortifying discrimination law means that the discrimination statutes should at least respond to underlying changes in tort law. It also opens the possibility that discrimination law retains the flexibility to respond to changing circumstances, such as new understandings about the way discrimination is perpetuated.

This Article proceeds as follows. Part II discusses the move to infuse discrimination statutes with a tort backdrop and meaning, as well as the move to textualism. Part III demonstrates how the combined influences of tortification and textualism mean that discrimination claims do not require a plaintiff to establish intent. Part IV argues that to the extent plaintiffs want to rely on intent-based frameworks, tort law intent is less onerous than the intent standard used in discrimination cases. Part V discusses how harassment doctrine should be recalibrated to reflect tort law and shows how tortification and textualism can be used to argue against current harm thresholds. Part VI explores how the tortification of discrimination law presents a major challenge to modern conceptions of statutory interpretation.

II. THE MOVE TO TORT LAW AND TEXTUALISM

This section discusses how Supreme Court cases over the past few decades embraced tort law as a substantive framework for discrimination law and textualism as an interpretive methodology.

Since 2009, the Supreme Court has rapidly infused discrimination law with tort concepts. This section provides a brief overview of the recent tortification trend. It explores this trend through case law interpreting two major federal discrimination statutes: Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA).[9]

Title VII, which is considered to be the cornerstone federal discrimination statute, provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

[9] Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e–2000e-17 (2012); Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634 (2012). The arguments made in this Article are applicable to the ADA context as well. Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 (2012). The ADA is not a primary focus of this discussion because the Supreme Court cases center on Title VII and the ADEA. I will not make arguments about cases brought pursuant to 42 U.S.C. § 1981 (2012).

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[10]

Although not identical, the Age Discrimination in Employment Act has similarly broad operative language.[11] Both Title VII and the ADEA contain inexact operative language that, in some instances, only vaguely describes the conduct prohibited under the statutes. Congress did not originally describe what kind of causation is required to establish a violation of these statutes. It did not use the word "intent" in the main provisions and did not define whether discrimination had to be intentional to violate the statutes.

In the 1970s and for most of the 1980s, the Supreme Court rarely invoked tort law to interpret these statutes. Over the last three decades, the Supreme Court has explicitly applied tort law to discrimination cases, especially cases involving intent and causation. The use of tort law in discrimination cases has become more robust and automatic in the past decade.

A watershed moment for the tortification of discrimination law occurred in 1989. In *Price Waterhouse v. Hopkins*, the Supreme Court considered whether a plaintiff could prevail on a Title VII claim if the evidence established that legitimate and discriminatory reasons both played a role in the employer's refusal to promote her.[12] In a concurring opinion, Justice O'Connor proclaimed that Title VII is a "statutory employment tort."[13]

In *Price Waterhouse*, the plurality opinion ultimately rejected tort principles. A plurality of four justices described the statutory problem before it, not through the lens of tort law, but rather as a broader question about the nature of causation.[14] The issue was not what tort law required, but about what kind of conduct violates Title VII. The plurality recognized that this question required the Court to consider how Title VII balanced the interests of employees and employers.[15] It rejected the idea that causation meant that the plaintiff is required to establish "but-for" cause.[16] The plurality reasoned that "to construe the words 'because of' as colloquial shorthand for 'but-for causation,' . . . is to misunderstand them."[17] The plurality held that to prevail on a discrimination claim, the plaintiff must establish that a protected trait is a motivating factor in a decision.[18]

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[10] 42 U.S.C. § 2000e-2(a) (2012).
[11] 29 U.S.C. § 623(a) (2012).
[12] Price Waterhouse v. Hopkins, 490 U.S. 228, 232 (1989) (plurality opinion).
[13] *Id.* at 264 (O'Connor, J., concurring) (internal quotation marks omitted).
[14] *Id.* at 237 (plurality opinion).
[15] *Id.* at 239.
[16] *Id.* at 240.
[17] *Id.*
[18] *Price Waterhouse*, 490 U.S. at 244.

In 1991, Congress responded to *Price Waterhouse* and other decisions by amending Title VII.[19] Importantly, the amendments do not mimic tort common law. For example, one change made by the 1991 amendments was to clarify through statutory language that a plaintiff can prevail on a Title VII claim if she shows a protected trait was a motivating factor in an employment decision. Under the amendment, a plaintiff may prevail on a Title VII discrimination claim if she establishes a protected trait was a motivating factor for a decision, and the employer may establish a limited defense to damages only if it shows it would have made the same decision absent a protected trait.[20] The substantive standards used in the amendment and the limited defense to damages are not directly drawn from the common law.

Nonetheless, the move to tort law gained momentum in 2009. In *Gross v. FBL Financial Services*, the Court held that the ADEA required a showing of but-for causation.[21] The Court rejected the idea that the ADEA should use the same causal standard as Title VII.[22] After rejecting the Title VII causal standard, the Justices were faced with a choice: what should the ADEA's causal standard be? For the majority opinion, the answer was short and simple. The words "because of" mean "but-for" cause.[23] In support of this proposition, Justice Thomas cited two cases outside the employment discrimination context and a torts treatise.[24]

The *Gross* decision is notably different than O'Connor's concurrence in *Price Waterhouse*. It is strongly textual and purports to rely on the plain meaning of the words "because of."[25] The opinion stated that the plaintiff bears the burden of proving but-for cause because this is the typical way burdens are allocated in litigation.[26] If Congress wanted to upset this typical allocation, it was required to explicitly do so.[27]

The Supreme Court also invoked common law tort principles in *Staub v. Proctor Hospital*, in which the Court interpreted the Uniformed Services

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[19] Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2012).

[20] *Id.* Congress also amended Title VII's disparate impact provisions and these amendments do not mimic tort law. *See* 42 U.S.C. § 2000e-2(k)(1)(A).

[21] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

[22] *Id.* at 174.

[23] *Id.* at 176.

[24] *Id.* at 176–77 (citing Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639, 653–54 (2008); Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 63–64, & n.14 (2007); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 265 (5th ed. 1984)).

[25] *Id.* at 176.

[26] *Id.* at 177.

[27] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009). This statement is strange given that *Price Waterhouse* allocated burdens differently without an express statutory provision and that tort law also allows for burdens to be allocated differently in some scenarios. Price Waterhouse v. Hopkins, 490 U.S. 228, 246 (1989) (plurality opinion). The *Gross* majority noted that *Price Waterhouse* would be decided differently if it arose in 2009. *Gross*, 557 U.S. at 178–79.

Employment and Reemployment Rights Act (USERRA).[28] *Staub* used two common law ideas: intent and proximate cause.[29] The Court's short analysis began with the statement: "[W]e start from the premise that when Congress creates a federal tort it adopts the background of general tort law."[30] Although *Staub* considered an interpretive question under USERRA, lower courts have applied this reasoning in the Title VII context because the Supreme Court emphasized the similarities between USERRA and Title VII in the *Staub* decision.[31]

In *University of Texas Southwestern Medical Center v. Nassar*, the Court determined whether a plaintiff proceeding on a retaliation claim under Title VII is required to establish but-for cause.[32] As with *Gross*, the opinion partially relied on the complex relationship between past Supreme Court precedents and the 1991 amendments to Title VII. However, this does not detract from the importance of the role of tort law in this case. Once the Court decided not to follow *Price Waterhouse* and the 1991 amendments to Title VII, it was required to make a choice regarding what the causation standard should be. The choice the Court makes—but-for cause—is largely driven by the majority opinion's narrow view of tort law and by *Gross*, which also relied on tort law.[33]

Nassar invoked tort law from the beginning of the opinion, defining the case as one involving causation and then noting that causation inquiries most commonly arise in tort cases.[34] The majority engaged in a lengthy discussion of causation's role in tort law, with numerous citations to the *Restatement of Torts* and a torts treatise.[35]

This increased use of tort law in discrimination coincided with the rise of the "new textualist philosophy."[36] Although definitions of textualism vary, this methodology defines the meaning of the statute by looking primarily at the language of the statute, without considering certain types of legislative history.[37] This methodology heavily relies on the text of the statute and certain

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[28] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1190–94 (2011).

[29] *Id.* at 1194.

[30] *Id.* at 1191.

[31] *Id.*; Davis v. Omni-Care, Inc., No. 10-3806, 2012 WL 1959367, at *7 (6th Cir. June 1, 2012); Jajeh v. Cnty. of Cook, 678 F.3d 560, 572 (7th Cir. 2012).

[32] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2523 (2013).

[33] *Id.* at 2523–25.

[34] *Id.* at 2524.

[35] *Id.* at 2525.

[36] Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1761–62 (2010) (noting the rise of the "new textualist" philosophy in the 1980s); *see generally* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988) (describing various statutory interpretation techniques).

[37] *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78 (2006) (noting that the dividing line between textualism and purposivism is not "cut-and-dried"); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 355 (2005)

conventions for determining the meaning of language, such as dictionaries, grammatical context, and other canons of construction.[38]

Those espousing new textualist methods argue that the most appropriate way to interpret a statute is to determine the meaning of the words used by the legislature.[39] Congress is required to say what it means in statutory language. Sources of meaning, such as legislative history, may not fully capture the intent of a multi-member legislative body or the compromises reached to ultimately pass a piece of legislation. For some pieces of legislation, finding a single legislative intent may not be possible.

One main competing methodology of new textualism is intentionalism. Judges using this methodology often use the text of a statute plus other indicia of intent, such as legislative history, to determine what Congress intended.[40]

The Supreme Court has used a textualist methodology in many employment discrimination cases.[41] Both *Gross* and *Nassar* employ textualist methods.[42] The majority opinion in both cases framed the primary issue as determining the meaning of the words "because of."[43] In doing so, the Court

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(discussing the acknowledgement by textualists of the relevance of purpose in statutory interpretation); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 592–93 (1988) (commenting that a plain meaning analysis must take into account both the internal context of the statute as well as the external context). Further, there is strong disagreement regarding whether the courts are required to determine the meaning of the statute at the time of its enactment or whether the meaning of the statute can vary over time. *See* Aleinikoff, *supra* note 36, at 21.

[38] Gluck, *supra* note 36, at 1763.

[39] *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

[40] The term "intentionalist" may be used to describe several different methods of statutory construction that allow the use of legislative history and other signals of intent, but these methods may differ significantly. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 366–68 (1994). Other intentionalists countenance the use of legislative and other materials to determine the plain meaning of the language in the first place. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325–26 (1990). In this Article, the term "intentionalism" refers broadly to those methods of statutory construction that countenance the use of some method of legislative intent. The third way jurists commonly interpret statutes is by considering whether the broad purposes of a statute support a particular interpretation. *See* McCreary Cnty. v. ACLU, 545 U.S. 844, 861 (2005). For example, a court might look to the broad, remedial purposes of a statutory regime to serve as a guide on whether to read a particular statutory provision broadly or narrowly.

[41] *See* William N. Eskridge, Jr., *Reneging on History?, Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 677–79 (1991) (discussing textualism in civil rights cases).

[42] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2528–31 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009).

[43] *Nassar*, 133 S. Ct. at 2524–25; *Gross*, 557 U.S. at 176–77.

added a new textualist canon to discrimination jurisprudence—unless Congress directs otherwise, the default meaning of words is a tort meaning.[44]

In *Nassar*, the Court defined the interpretive question to involve the meaning of the words "because of," which the Court characterized as a causal question.[45] The Court cited numerous sections from the *Restatement of Torts* in support of its holding that Title VII's retaliation provision requires a plaintiff to establish but-for cause.[46] It also cited a torts treatise.[47] Importantly, the Court did not undertake an extensive review of the full meaning of the tort concepts; nor did it explain why it is appropriate to apply causal principles from negligence law to discrimination law. *Nassar* shows the interpretive frame for analyzing discrimination statutes under the combined influences of tortfication and textualism. This interpretive frame requires the court to find a word in the discrimination statutes and then define that word as it would be defined under the common law.

Gross provides a similar analysis. The Court framed the case as requiring the Court to define the words "because of" in the ADEA.[48] The Court defined the ADEA's causal language as requiring the plaintiff to establish but-for cause.[49] It cited dictionaries and a torts treatise in support of this result.[50]

III. DISCRIMINATION STATUTES DO NOT REQUIRE INTENT—EVEN FOR DISPARATE TREATMENT CLAIMS

The next three Sections address radical changes in discrimination law that can happen if courts take the combined influences of tortification and textualism seriously. When combined, these two concepts resolve a key question in discrimination law: whether a plaintiff must establish intent to prevail on an individual disparate treatment claim. Courts have repeatedly asserted that disparate treatment claims are intentional.[51] Neither the ADEA

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[44] In other work, I have shown how this textual argument is not correct. *See* Sperino, *Tort Label*, *supra* note 4, at 1053. Notably, *Staub* does not purport to be driven by textualism, even though the opinion is written by Justice Scalia. *Staub* delineated USERRA as an intentional tort and applied proximate cause ideas to the statute, but it never connected these ideas with the language of the underlying statute. Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191–94 (2011).

[45] *Nassar*, 133 S. Ct. at 2525–26.

[46] *Id.* at 2524–25.

[47] *Id.*

[48] *Gross*, 557 U.S. at 175–76.

[49] *Id.* at 176.

[50] *Id.* at 176–77.

[51] *See* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1368 (2009) (noting that "[f]ew propositions are less controversial or more embedded in the structure of Title VII analysis than that the statute recognizes only 'disparate treatment' and 'disparate impact' theories of employment discrimination.").

nor Title VII use the term "intent" in its primary operative language.[52] Rather an employer violates the statute when it takes certain employment actions because of a protected trait. Numerous scholars have argued that this language refers to causation, not intent.[53] More than two decades ago, Professor Oppenheimer laid the theoretical groundwork for a negligent discrimination claim.[54] Although certain areas of discrimination law have aspects of negligence law, the idea that a plaintiff could establish a disparate treatment claim through a non-intent framework has not gained traction.[55]

Staub reiterated that discrimination statutes are torts and that Congress adopted discrimination statutes against a common law backdrop.[56] *Gross* and *Nassar* defined "because of" language in the ADEA and the Title VII retaliation provision to mean causation. Taken together, *Gross*, *Staub,* and *Nassar* provide a textual argument that Title VII and the ADEA allow a plaintiff to proceed on a disparate treatment claim without proving intent.

In both *Gross* and *Nassar*, the Supreme Court interpreted the "because of" language in federal discrimination statutes to mean "but-for" cause. Both of these cases hold that the "because of" language is causal language.[57] Tort law uses intent language to describe intent and causal language (like factual cause and legal cause) to discuss causation. If the discrimination statutes are torts, it is strange to assume that Congress meant to conflate both causal language and intent language in the words "because of." No other words in the main operative language point toward intent.

If Title VII and the ADEA are derived from the common law, then Congress knew how to use intent-like words when defining the elements of a claim. When the *Restatement (Second) of Torts* describes the elements of battery, it uses the concept of intent. It indicates that "[a]n actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other . . . ."[58] Likewise, the *Restatement* uses intent language to describe other intentional torts, such as

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[52] When intent language is used in the statutes, it refers to affirmative defenses, or the plaintiff's ability to obtain a jury trial or obtain certain types of remedies. *See* 42 U.S.C. § 1981a(a)(1) (2012) (stating that punitive and compensatory damages are available when a plaintiff proves intentional discrimination).

[53] *See* Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1475 (2012) (discussing scholarship); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 916–17 (1993).

[54] *See generally* Oppenheimer, *supra* note 53, at 916–17.

[55] *See, e.g.*, Aaron v. Sears, Roebuck & Co., No. 3:08 CV 1471, 2009 WL 803586, at *2 (N.D. Ohio Mar. 25, 2009) ("He also alleges Defendant was merely 'negligent' in its hiring practices, which does not rise to the standard of intentional discrimination required by Title VII."); Jalal v. Columbia Univ., 4 F. Supp. 2d 224, 241 (S.D.N.Y. 1998) ("Title VII, however, provides no remedy for negligent discrimination . . . .").

[56] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191, 1194 (2011).

[57] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2523 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

[58] *See* RESTATEMENT (SECOND) OF TORTS § 18 (1965).

assault and false imprisonment.[59] That Congress chose not to use this same language in the primary operative language of the discrimination statutes, even though, according to the Supreme Court, it was acting against the backdrop of the common law, is telling. This argument is bolstered by the fact that Congress did use the words "intended" and "intention" in other provisions of Title VII.[60]

The most textually compatible reading of the discrimination statutes is that they do not require the plaintiff to prove intent, but that the plaintiff may choose to try to make her case by showing intentional discrimination. This interpretation of the discrimination statutes is also more consistent with Supreme Court precedent. In 1971, the Supreme Court interpreted the original operative language of Title VII as allowing a disparate impact claim, which does not require a showing of intent.[61] Failure-to-accommodate cases, for either religion or disability, do not require the plaintiff to establish that the decisionmaker possessed any animus or intent. There is no textual impediment to a non-intent-based claim outside the disparate impact and accommodation contexts.

To read discrimination law as requiring intent, one has to read concepts into the statutory language that are not included in the actual text. In *Nassar*, the majority opinion indicated that the "desire to retaliate" must be the "but-for" cause of the action taken.[62] This articulation adds a step that is not supported by a tort reading. If "because of" means causation, then the employment action need only result from the fact of the protected trait, in that if the person had another protected trait, the outcome would be different. In the retaliation context this would mean the outcome would have been different if the plaintiff had not engaged in the protected activity. While in many instances, this result may happen because a bad actor harbors animus, animus is not required.[63]

In some cases, whether the plaintiff has to establish intent determines whether the plaintiff will win or lose the case. Two examples help to illustrate the types of cases where the replacement of causation with intent would make a doctrinal difference. Before orchestras started using blind auditions, men were disproportionately selected for certain positions, even though there was no apparent animus or intent.[64] When orchestras started using blind auditions,

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[59] *Id.* §§ 21, 35 (assault and false imprisonment).

[60] *E.g.*, 42 U.S.C. § 2000e-2(h) (2012).

[61] Griggs v. Duke Power Co., 401 U.S. 424, 429–33 (1971).

[62] *Nassar*, 133 S.Ct. at 2521.

[63] The *Gross* decision, for the most part, does not blur this line between causation and intent. It holds that to prevail on a disparate-treatment claim, the plaintiff must establish that age was the but-for cause of the employment action. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009).

[64] Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 717–20 (2000).

it increased the number of women chosen.[65] The non-blind selection procedure was allowing the outcome of the selection process to be affected by sex, even though it would be difficult for a plaintiff to prove that the orchestras intended to do so.[66] Given the few orchestra positions available each year, it is very unlikely that a plaintiff would be available to establish a disparate impact claim.

A second example is when an employer makes salary decisions by giving supervisors wide discretion in determining the amount of employees' compensation. Assume that over time, most women who work for the employer or who work in particular positions receive a lower salary than men with similar credentials. The women cannot point to any particular animus or intent that is causing this outcome. Given the difficulties of establishing a disparate impact claim, it is important to know whether the female workers could proceed under a disparate treatment framework without showing intent.

In both of these situations if "because of" means causation, the women may be able to prevail on their claim, even though they cannot point to a bad actor or establish intent. Their evidence could show that if they were men, they would have received the position or been paid more.[67] Replacing an intent standard with a causation standard makes it possible to prove cases of unconscious or structural discrimination, without proceeding through a disparate impact analysis.

This causation standard also allows us to conceptualize a separate form of employer liability that does not rely on the intent of individual actors. The federal discrimination statutes do not provide for individual liability. Rather, the employer is the entity liable for discrimination.[68] Outside of pattern or practice claims, the courts have had trouble transferring the concept of intent to the entity context. Because traditional intent doctrines developed in the context of individual liability, they are sometimes difficult to apply to entities.

With a causation standard, this difficulty diminishes. *Wal-Mart v. Dukes* shows a factual scenario where the switch from intent to causation is critical.[69] In *Dukes*, the plaintiffs alleged that Wal-Mart provided a spectrum of possible wages for employees in a particular position.[70] The plaintiffs' statistical evidence suggested that women were, on average, paid on the lower end of the pay spectrum.[71] According to the plaintiffs' allegations, Wal-Mart provided supervisors with wide discretion to make decisions about where to place employees along the spectrum.[72] It is unlikely that the plaintiffs would be able to establish that the entity Wal-Mart had animus or even "intent" as courts

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[65] *Id.* at 716.
[66] *Id.* at 716–17.
[67] The statistical analysis might be complex.
[68] *See, e.g.*, Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993).
[69] *Dukes*, 131 S. Ct. 2541, 2547–48 (2011).
[70] *Id.* at 2563 (Ginsburg, J., concurring in part and dissenting in part).
[71] *Id.*
[72] *Id.*

tend to characterize that concept in the discrimination context. However, the plaintiffs may be able to establish that their sex made a difference in the outcome. If all other reasons for paying a worker less are stripped away and sex remains, the women could establish that sex caused the pay differential under a disparate treatment theory.

IV. DISCRIMINATION'S INTENT STANDARD IS LESS ONEROUS

Some plaintiffs may want to proceed under an intentional discrimination framework, even if the text of the discrimination statutes does not require them to do so. Their evidence may fit better within an intent narrative, and they may believe that juries and judges will find intentional discrimination claims more sympathetic. Under Title VII, plaintiffs may want to obtain punitive or compensatory damages, which are only available if the plaintiff proves intentional discrimination.[73]

The move to tort law is important for three different intent issues. First, if we presume that courts should use tort law concepts to define intent then discrimination plaintiffs alleging intentional conduct should not be required to establish animus or mens rea. Second, tort law highlights how the courts have been inexact in defining what they mean by intent and what consequences a decisionmaker must intend. Third, using tort law opens the door for using the concept of transferred intent in discrimination cases.

As discussed in the prior section, the discrimination statutes do not use the term "intent" to define the cause of action. Rather, the courts have developed this concept over time and sometimes refer to individual disparate treatment cases as requiring the plaintiff to show intent. Surprisingly, there is no Supreme Court case that expressly defines the intent required to prove discrimination. The cases that address intent provide a varied view of the requirement. Some cases appear to impose a heightened form of intent that is akin to animus or mens rea.[74] *Staub* itself discusses the term "animus," but this is largely due to the fact that the plaintiff had evidence of animus.[75] *Staub* does not impose an animus requirement, but rather, it recognizes that the plaintiff may proceed using an animus construct.[76]

Tort law makes it clear that the minimum standard for intentional tort culpability is not animus. The *Restatement (Second) of Torts* defines intent as requiring that the actor desires the consequences of his action or "believes that the consequences are substantially certain to result from [the action]."[77] If courts are required to presume that Congress was legislating against a common

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[73] 42 U.S.C. § 1981a(a)(1) (2012).

[74] *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 637 (2007) (using the term "animus"); Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 7 (2011) (arguing that recent cases move away from an animus-based notion).

[75] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011).

[76] *Id.*

[77] RESTATEMENT (SECOND) OF TORTS § 8A (1965).

law backdrop, then the courts should assume that the standard tort definition of intent applies in discrimination cases. Although some torts require a higher level of intent, it would be strange to presume that these less common meanings applied, without any explicit indication in the statutory language. Since the federal discrimination statutes do not even mention intent in their primary operative language, it is unlikely that Congress intended the further step of rejecting the traditional intent concept in favor of a higher animus standard.[78]

The *Restatement*'s intent standard is two-pronged, allowing the plaintiff to prevail by establishing either definition of intent.[79] Adding the substantial certainty test to discrimination law would be an important innovation. For example, consider an employer that has data showing that its employment practices result in a disparity based on sex. Perhaps the employer has knowledge that it uses subjective pay criteria and when supervisors use subjectivity that women are paid less than men. Future continued use of these subjective criteria would meet the substantial certainty intent standard. The employer would know that the outcome of its employment practice was substantially certain to result in pay differentials because of sex.

Defining intent in the discrimination statutes in this way will help the courts to see a way in which they have not been careful about conceptualizing intent. Currently, the case law is unclear about whether the discriminatory actor must intend the differential outcome or whether the person only has to intend the employment action.

An example is helpful in understanding the problem. Assume a situation in which a supervisor is making decisions about how much to pay two employees within a defined spectrum of potential pay. Without consciously thinking about it too much, the supervisor decides to pay the woman $10 an hour and the man $11 an hour. The supervisor is not consciously thinking about paying women less than men and would deny any animus or intent in a deposition. Assume the record would also show that an objective view of both employee's work histories and performance do not justify the pay differential.

In this scenario, the critical question is whether intent requires the decisionmaker to consciously take sex into account or to intend the differential outcome. If so, a woman would not be able to establish a discrimination claim. However, if the construct requires that the supervisor merely intend the pay decisions and that those decisions result in a pay differential tied to sex, then a plaintiff can prevail on an intentional discrimination claim.

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[78] The move to tort law opens an interesting interpretive question under Title VII. In 1991, Congress amended Title VII to allow a plaintiff to prevail if she is able to show a protected trait was a "motivating factor" in an employment action. 42 U.S.C. § 2000e-2(m) (2012). It is unclear whether this standard is merely a causal standard, or, if in mixed-motive cases Congress meant to impose a higher "motive" requirement. *See Staub*, 131 S. Ct. at 1195–96 (Alito, J., concurring).

[79] RESTATEMENT (SECOND) OF TORTS § 8A (1965).

This second understanding of intent is consistent with how intent is conceived in trespass cases. In a trespass case, the tortfeasor is not required to know that he is physically present on the land of another to commit the intentional tort of trespass.[80] The violation of the possessory interest of another does not require the knowledge that the interest is being violated. Using tort law to define intent shows how courts have not been careful in defining what a wrongdoer needs to intend to create liability under the discrimination statutes.

Not only does tort law diminish the intent required in discrimination cases, it also allows the use of transferred intent. Intentional torts embrace the idea of transferred intent. For example, in assault cases, the intent required is to place someone in apprehension of a bodily contact.[81] The *Restatement (Second) of Torts* provides examples of transferred intent. One of the illustrations is of a person, person *C*, who is intentionally aiming a gun at another person, person *B*.[82] At that moment, person *A* comes from behind a tree and sees the gun pointed in his direction.[83] *C* faces liability to A in this instance, even though the intent is originally against *B*, not *A*.[84] This same idea could be used to expand the potential plaintiffs in discrimination cases.

Consider the following example. Let's assume that a supervisor sexually harasses Molly. The evidence establishes that all of his actions are focused on Molly and for the purposes of the hypothetical, let's assume that the evidence will establish that the supervisor did not mean to sexually harass any other women. Nonetheless, Paula, another woman in the workplace, witnesses the harassment and reasonably believes that her opportunities in the workplace are limited or reasonably believes that witnessing the actions changes the terms or conditions of her work. Under a tort theory of intent, Paula could establish intent in this situation.

Relying on tort law should radically change how courts describe and think about intent in discrimination cases. It should lower the intent standard, open the possibility for liability when the employer is substantially certain a result will occur, show instances where the courts have been inexact in describing the required nexus between intent and the negative outcome, and provide for transferred intent as a viable theory of recovery.

V. THE HARM THRESHOLD IS LOWER

If the discrimination statutes are torts, the courts must recalibrate the harm threshold for both harassment cases and for determining when an adverse employment action occurs.

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[80] *Id.* § 158.
[81] *Id.* § 32.
[82] *Id.* § 32 cmt. b, illus. 3.
[83] *Id.*
[84] *Id.*

Some harassment cases involve physical touching or imminent, threatened touching.[85] Tort law categorizes this conduct as battery or assault.[86] Despite this strong connection with tort law, court interpretation of the discrimination statutes sometimes imposes more onerous requirements than those imposed for battery and assault.

In 1986, the Supreme Court officially recognized harassment as a type of discrimination in *Meritor Savings Bank v. Vinson*.[87] In that case the plaintiff alleged that her supervisor fondled and raped her, so harassment doctrine originally developed in the context of battery and assault.[88] Nonetheless, the Supreme Court imposed requirements on plaintiffs that are sometimes more onerous than under tort law.

To be actionable a hostile work environment must affect the terms, conditions, or privileges of employment.[89] In interpreting when harassment would rise to this level, the Court held that it must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment . . . ."[90] In 1993, the Supreme Court held that a plaintiff alleging harassment need not allege psychological injury, but would be required to establish that she subjectively believed the environment to be hostile or abusive and that the environment would be so viewed by an objective person.[91] In making this latter inquiry, the Court noted:

> But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.[92]

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[85] *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986); Hockman v. Westward Commc'ns, LLC, 407 F.3d 317, 328 (5th Cir. 2004); Shepherd v. Comptroller of Pub. Accounts, 168 F.3d 871, 872–75 (5th Cir. 1999); Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 337 (7th Cir. 1993).

[86] RESTATEMENT (SECOND) OF TORTS §§ 18, 21 (1965).

[87] *Meritor Sav. Bank*, 477 U.S. at 72.

[88] *Id.* at 60.

[89] *Id.* at 67.

[90] *Id.* (citation omitted) (internal quotation marks omitted).

[91] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–23 (1993).

[92] *Id.* at 23. Although there are some variations, courts tend to articulate a harassment claim as requiring proof that the plaintiff is a member of a protected class, that she was subjected to unwelcome sexual harassment, that the harassment was based on sex, and that it affected a term, condition or privilege of employment. *See, e.g.*, Sandoval v. Am. Bldg. Maint. Indus., Inc., 578 F.3d 787, 801 (8th Cir. 2009). The fourth element contains both objective and subjective components, requiring the harassment to be "severe or pervasive enough to create an objectively hostile or abusive work environment," as well as requiring the victim to subjectively perceive the working conditions to be so altered. *Id.* (citation omitted) (internal quotation marks omitted).

Under tort law, the invasion of a person's physical space in a harmful or offensive way or the imminent threat of such invasion is enough to establish the tort.[93] This is not the case with harassment law, where the plaintiff must establish that she perceived the conduct to be severe or pervasive enough to affect her work and that an objective, reasonable person would also perceive the conduct that way.[94] These requirements have led to absurd results. Courts have declared that the following conduct does not constitute harassment as a matter of law: kissing, slapping a worker on the behind with a newspaper, brushing up against a plaintiff's breast and behind, rubbing the plaintiff's arm from shoulder to wrist, and attempting to touch the plaintiff on numerous occasions.[95]

If discrimination statutes are torts, then physical invasions should be treated with the same level of respect with which physical invasions are treated under tort law. The plaintiff should not be required to show repeated inappropriate touching or especially extreme inappropriate touching to prove her claim. Rather, if discrimination is a tort, discrimination law should recognize that intrusions upon physical dignity constitute cognizable harm. Invasions or threatened invasions of this interest should result in liability without repeated or especially egregious conduct.

Embracing textualism and tortification can also expand how the courts perceive remedies. For most torts, tort law separates the idea of injury from damages. In a trespass case, a defendant is liable for invading the possessory interest of another, even if he does not harm a single blade of grass on the plaintiff's property.[96] Likewise, a person commits a battery simply by poking another person with his pinkie finger in an offensive way, even if no physical harm results.[97] In both of these cases, the harm happens when the interest is violated.[98]

This dichotomy between injury and damages typically is not an issue in discrimination cases because the plaintiff often has proof of monetary or emotional harm. In most cases, the idea of injury and compensable damages does not need to be separated. But, in some cases, the dichotomy is critically important.

All courts will recognize a cause of action when an employer takes an action that is explicitly prohibited by the federal discrimination statutes, such as termination or failure to hire. Some federal courts refuse to allow a plaintiff

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[93] RESTATEMENT (SECOND) OF TORTS §§ 18, 21 (1965).

[94] *Harris*, 510 U.S. at 21–23.

[95] *See, e.g.*, Hockman v. Westward Commc'ns, LLC, 407 F.3d 317, 328 (5th Cir. 2004); Shepherd v. Comptroller of Pub. Accounts, 168 F.3d 871, 872–75 (5th Cir. 1999); Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 337 (7th Cir. 1993).

[96] RESTATEMENT (SECOND) OF TORTS § 163 (1965).

[97] *Id.* § 18.

[98] *Id.* §§ 18, 163. Negligence incorporates damages as part of the elements of the plaintiff's claim. *See, e.g.*, Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 898–99 (Mass. 2009).

to proceed on a discrimination claim if the courts do not deem her harm to be serious enough.[99] The courts call this concept "adverse employment action" or "ultimate employment action."[100]

There is no consensus on the required level of harm, and one court noted that "[d]ivergent authority, nationwide, obscures the parameters of adverse employment action."[101] Some courts have held that criticism or counseling do not constitute an adverse employment action.[102] Some courts hold that negative evaluations are not serious enough to result in liability.[103] In other words, even if a plaintiff proves that her supervisor gave her a bad evaluation based on her sex or race, the plaintiff cannot prevail on a discrimination claim in courts with a higher harm threshold.

This result does not follow from either textualism or most tort law. Title VII prohibits an employer from discriminating against "any individual with respect to his compensation, terms, conditions, or privileges of employment" and also prohibits the employer from limiting employees in any way that "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."[104] Getting negative evaluations affects an employee's "terms or conditions" of employment and also deprives or tends to deprive the person of employment opportunities or otherwise affects her status.

Other than imposing a de minimis threshold, most torts do not define the minimal level of harm that must occur to establish a violation. Once the interest is violated, the plaintiff can legally establish the claim without proving additional harm. If discrimination law is like most torts, then once the

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[99] Burlington N. & Santa Fe Ry., Co. v. White, 548 U.S. 53, 60–61 (2006) (discussing adverse action requirement in discrimination and retaliation cases).

[100] *Id.*

[101] Nelson v. Univ. of Me. Sys., 923 F. Supp. 275, 281 (D. Me. 1996).

[102] *Id.* at 281–82 (applying adverse employment action concept to Title IX retaliation claim but claiming to use Title VII standards); Fausto v. Welch, No. 89-1542-WF, 1994 WL 568846, at *7 (D. Mass. Oct. 12, 1994) ("Disparaging remarks can, under proper circumstances, constitute an adverse employment action [under Title VII]. To do so, however, such disparaging comments must significantly impair the employee's ability to function in his position."); *see also* Simmerman v. Hardee's Food Sys., Inc., No. CIV. A. 94-6906, 1996 WL 131948, at *14 (E.D. Pa. Mar. 22, 1996) (criticism is not adverse employment action under the ADA); Lefevre v. Design Prof'l Ins. Cos., No. C-93-20720 RPA, 1994 WL 544430, at *1-2 (N.D. Cal. Sept. 27, 1994) (harsh criticism of an employee's work does not constitute adverse employment action).

[103] *See, e.g.*, Sotomayor v. City of N.Y., 862 F. Supp. 2d 226, 254 (E.D.N.Y. 2012), *aff'd*, 713 F.3d 163 (2d Cir. 2013); Taylor v. N.Y.C. Dep't of Educ., No. 11-CV-3582, 2012 WL 5989874, at *7 (E.D.N.Y. Nov. 30, 2012) (being rated as having unsatisfactory performance not sufficient to constitute an adverse action); Siddiqi v. N.Y.C. Health & Hosps. Corp., 572 F. Supp. 2d 353, 367 (S.D.N.Y. 2008); Johnson v. Frank, 828 F. Supp. 1143, 1153 (S.D.N.Y. 1993) (rating of "unacceptable" at mid-year review not an adverse employment action).

[104] 42 U.S.C. § 2000e-2(a) (2012).

employer violates the underlying interest, the plaintiff should be able to prevail on a claim, unless the statute provides otherwise.

VI. TORT COMMON LAW IS BOTH MEANING AND METHOD

Together, tortification and textualism can radically alter substantive discrimination law. But tortification poses a bigger challenge to the very meaning of textualism. Tort law is a set of substantive, doctrinal choices. Those choices are paired with a common law methodology in approaching problems. If employment discrimination is a tort, does it retain both the substantive content of tort words and its underlying methodology?

Recent Supreme Court cases claim that discrimination law is a tort and that Congress intended that the statutes' words be interpreted against the backdrop of tort law.[105] Unless otherwise indicated, the Court is required to look to tort law to define statutory terms. Implicit within this statement is the idea that Congress understood what the common law of torts was and how it would interact with the statute it was passing. One fundamental aspect of tort law is that it was created using a common law methodology, where the meaning of words and concepts develop over time and respond to changed circumstances. In other words, common law torts maintain some flexibility to change over time.

This flexibility raises important questions about what textualism means if Congress intended to import common law tort concepts into a statutory regime. There are at least three possible answers to these questions. First, when Congress enacted the discrimination statutes, it could have intended to adopt current tort principles, along with their underlying common law methodology. Under this approach, Congress intended the language in the statute to develop over time, just as tort law does. Second, Congress could have intended to adopt common law words, but to only allow discrimination law to change in the future if tort common law changed. The third, and least plausible, argument is that Congress intended to enshrine a particular substantive tort meaning that becomes frozen within the statute, even though tort law changes over time. In other words, it is unlikely that Congress intended to reject a major tenet of tort law (its methodology) without an express indication that it was doing so.

One basic feature of the common law is the way that it can change in response to changed circumstances. The common law largely remains stable over time given judicial commitment to stare decisis, but there are moments when the common law changes drastically. When traditional notions of causation and proof did not work for modern problems, courts changed the common law to account for the changing factual landscape.[106] Some examples

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[105] *See supra* Part II.

[106] *See, e.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916) (discarding privity requirements for certain injury claims involving defective products).

of this include the separation of factual cause and proximate cause concepts, the recognition of comparative negligence, and the development of products liability law and concomitant abolition of privity concepts.

However, current popular models for interpreting statutes rely on notions of legislative intent and textualism, both of which are difficult to marry with common law methodology, unless one subscribes to forms of dynamic statutory interpretation.[107] This problem is amplified by the ways the courts approach stare decisis with regard to statutes, adopting an especially strong presumption against overruling prior interpretations of statutes.[108]

Given that a central feature of the common law is its occasional elasticity, a fair argument flowing from the tortification of discrimination law is that Congress also intended the courts to have the flexibility to engage the statutory language and to adjust its contours over time in response to changing circumstances. While thus far the tortification of discrimination law has led to increasingly pro-employer interpretations of the statutes, this one feature of tortification provides an opportunity for courts to allow the discrimination statutes to respond to modern understandings about the ways people are treated differently because of protected traits.

In other words, if Congress thought discrimination law was a tort, this intent expressed two separate ideas: (1) read the statutes initially to be in tandem with tort principles and (2) maintain flexibility within the law to deal with changed circumstances, as tort law does. This second idea is a powerful challenge to modern statutory interpretation, especially textualism. It also is a challenge to the idea of "super stare decisis" in the statutory context.

When common law definitions are applied to statutes without using a common law methodology, there is a risk that the definitions become inflexible, even if this result would not obtain under the common law. This is because the courts tend to view statutory words as having one fixed meaning that does not change over time. Imagine for a second a world in which there were common law causes of action for employment discrimination. Given the flexibility of the common law methodology, one would expect the meaning of its central elements to change over time, even if the common law tort retained its central structure and language.[109] If discrimination law is truly a tort, it

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[107] *See generally* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

[108] *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 327–28 (2005) ("A majority of the circuits has explicitly adopted the super-strong presumption against overruling statutory precedents, and in those circuits that have never explicitly applied the rule, separate opinions assume that it applies.") (footnotes omitted); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (discussing "super-strong" statutory stare decisis in the Supreme Court).

[109] For an example of this phenomenon in the torts context, see MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 132–133 (2010) (discussing how courts used but-for causation standard in wrongful birth cases but reframed the inquiry over time to allow plaintiffs to proceed on claims).

should retain the flexibility to adapt to changed circumstances over time, including new understandings of how discrimination occurs.

Another possibility is that Congress intended for the discrimination statutes to be read initially in tandem with tort principles and that the statutes should remain in tandem with tort principles over time. This claim is also in tension with modern statutory interpretations that purport to identify one meaning of a term within a statute and then provide that meaning with an especially robust precedential effect.

The Supreme Court has implicitly adopted this kind of reasoning, that the discrimination statutes should keep pace with modern understandings of tort law. *Nassar* provides a good example. The *Restatement (First) of Torts* considered proximate cause and factual cause to be a singular concept.[110] In negligence cases, a defendant's actions were a legal cause of harm if they were "a substantial factor in bringing about the harm."[111] The *Restatement (Second) of Torts* retains a similar unitary concept.[112] It is not until after the enactment of both Title VII and the ADEA that the ideas of proximate cause and factual cause are defined separately in the *Restatement*.[113]

As discussed earlier, *Nassar* held that the words "because of" in Title VII's retaliation provision mean that the plaintiff must establish protected activity was a but-for cause of an adverse action.[114] However, this holding does not reflect the *Restatement* published at the time of the statute's enactment. If it did, legal cause under the retaliation provision would have been a substantial factor test, conflating what a modern lawyer would separate into legal and factual cause. Instead, *Nassar* explicitly relied on definitions of tort concepts that were not formalized in the *Restatement* until after Congress enacted the relevant statute.[115]

This interpretive move has big implications for statutory interpretation principles. Congress's intent, as expressed in textual language, can be an intent for a word to change meanings over time. The "super stare decisis" principle cannot hold for words that the courts declare as deriving from the common law.

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[110] RESTATEMENT (FIRST) OF TORTS § 430 (1934) (indicating that to establish legal cause the plaintiff must be in the class of persons to which the defendant's actions create a risk of causing harm); *id.* § 431 (defining legal cause as being a substantial factor in bringing about the harm, without an exception to relieve the defendant of responsibility); *id.* § 433 (defining legal cause with concepts such as whether there was a continuous force or series of forces and whether the harm was highly extraordinary given the defendant's conduct).

[111] *Id.* § 431.

[112] RESTATEMENT (SECOND) OF TORTS § 431 (1965).

[113] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. a (2010) (recounting historical development).

[114] *See supra* Part II.

[115] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525 (2013) (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 (2010); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 265 (5th ed. 1984)).

The third option—that Congress intended to enshrine a specific tort meaning at the time of enactment and for that meaning to be entrenched even as the common law changed—is the least plausible. As noted above, the Supreme Court does not appear to be trying to divine common law tort meanings from the time of each statute's enactment. This third option also requires the belief that Congress meant to adopt the common law of torts without one of its primary features: its ability to change over time.

It also creates the problem that over time the statutes will enshrine old versions of the common law, even as the courts modify the underlying tort law over time in light of changed circumstances. The statutes then become out of sync with the very concepts Congress was trying to enshrine. A further difficulty is added by statutory amendments. When Congress amends a statute, is it meaning to bring the entire statute in line with current common law or only revised portions of the statutes?

One response to this argument could be that by making a statutory tort, Congress intended to divest concepts of their evolving nature. It is difficult to determine what Congress understood with respect to Title VII and the ADEA because modern statutory interpretation was not used in 1964 and 1967 when Congress passed Title VII and the ADEA. More importantly, in *Gross* and *Nassar*, the Supreme Court held that if Congress wanted to contradict the common law, it was required to do so expressly.[116] If Congress wanted to reject a core feature of the common law—its ability to change over time—it is fair to require Congress to articulate that desire.

VII. CONCLUSION

The move to tortify discrimination law is not supported by the history, text, or purpose of the federal discrimination statutes. Nonetheless, the Supreme Court is strongly imbuing discrimination law with a tort conception and meaning. It also is increasingly viewing these statutes through the interpretive device of textualism. Given these moves, it is necessary to consider what tortification and textualism mean for the discrimination statutes. This Article demonstrates that both of these arguments can be used to broaden the scope of discrimination law. They also radically challenge current ideas about statutory interpretation and the fixed meaning of statutory terms.

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[116] *See id.* at 2529; Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173–75 (2009).